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No. 92-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ADVANCE CHEMICAL COMPANY *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government concedes that the court of appeals decision presents the issue of whether private parties are authorized to make *any* challenge to the costs incurred by the United States in the execution of a properly selected remedial plan. As explained in the petition and left unchallenged by the Government, the court of appeals decision requires reviewing courts to award the Government *all* costs incurred to implement a properly selected cleanup plan for a waste disposal site, including even extravagant and unnecessary costs such as the purchase of the fabled gold-plated bulldozer. Extreme in its defense of that decision, the Government proclaims that any other result would have turned federal courts into inspectors general with the temerity to second-guess a federal agency's expenditure of costs that are passed through for payment by private litigants. By reaching so far to defend a ruling that conflicts with the way other courts of appeals have read the Superfund statute, the Government's Opposition illustrates why this case raises a fundamental issue of national importance that merits review by this Court.

The Government, in its Opposition, also is unsuccessful in its attempt to explain away the conflict among the courts of appeals on the second issue presented by the petition: whether an interlocutory summary judgment should be reviewed on appeal in light of the entire trial record. Instead, it argues that an erroneous *denial* of summary judgment is always subject to review on a full record, while the erroneous *grant* of summary judgment can never be corrected. The Government provides no rationale for this so-called "distinction." The Government seems to be suggesting that judicial error in one type of interlocutory ruling is better than judicial error in another. The petitioners disagree. This case presents an appropriate opportunity to resolve a mature conflict among the courts of appeals on this significant question of appellate procedure.

I. THERE IS AN IMPORTANT CONFLICT AMONG THE CIRCUITS CONCERNING THE AUTHORITY OF COURTS TO REVIEW *ANY* CHALLENGE TO COSTS INCURRED BY THE UNITED STATES TO DEVELOP AND IMPLEMENT REMEDIES AT SUPERFUND SITES.

The Government's primary argument in opposition to the first issue raised by the petition is that the Tenth Circuit's decision is "correct." Brief for the United States in Opposition ("Br. Opp.") 10. The Opposition quotes the opinion below at length and, like the court of appeals, reads section 107(a)(4)(A) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a)(4)(A), to allow the United States to "recover '*all* costs' for response actions, provided that those *actions* are not inconsistent with the NCP." Br. Opp. 11 (emphasis added). The Government disagrees with petitioners' contention that the court of appeals effectively rewrote the words of the statute. Br. Opp. 11. In view of that disagreement, it is important to review again what the statute actually says. Section 107(a)(4) provides liability for:

> (A) all *costs* of removal or remedial action *incurred* by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]
>
> (B) any other necessary *costs* of response *incurred* by any other person consistent with the national contingency plan;

42 U.S.C. § 9607(a)(4) (emphasis added).

It is difficult to understand—by reading the words in the statute—how the Government can contend that the statute must be interpreted to require courts to review only whether the "actions" (as opposed to the "costs") are consistent with the NCP. Subsections 107(a)(4)(A) and 107(a)(4)(B) both expressly refer to what is "incurred" as the item that must be reviewed for consistency with the NCP. As a matter of grammar and logic, only costs—not removal or remedial actions—can be "incurred." Since the statute on its face expressly permits review of "costs" that are "incurred," the Government does not offer a valid defense of the Tenth Circuit decision by proclaiming that the language of the statute only permits challenges to response actions, and not costs.[1]

The Government's secondary argument—that there is no real conflict among the circuits on the legal standard for reimbursement of Government costs—also lacks merit. The Government asserts that the Tenth Circuit's decision is consistent with the decision in *United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO")*, 810 F.2d 726 (8th Cir. 1986), *cert.*

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[1] Seizing every opportunity to use the word "factbound" in its Opposition, the Government seems to be suggesting that an issue presented here is whether petitioners made a showing in the district court that the underlying "removal or remedial action" was inconsistent with the NCP. Br. Opp. 12. That is not the issue presented here. The question before the Court is whether the statute must be read to preclude *all* challenges to the *costs* incurred in executing a removal or remedial action—not whether particular challenges to a removal or remedial action are meritorious.

denied, 484 U.S. 848 (1987). But the Government's Opposition ignores the quotation from *NEPACCO* set forth in the petition:

> {H}ere, appellants failed to show that the Government's response *costs were inconsistent with the NCP*. Appellants *also* failed to show that the EPA acted arbitrarily and capriciously in *choosing the particular method* it used to clean up . . . .

Pet. 11 (quoting *NEPACCO*, 810 F.2d at 748 (emphasis added)).

If, as the court of appeals below held, CERCLA requires all costs to be recoverable, the *NEPACCO* court never would have permitted a separate challenge to the costs incurred by the Government; it would have permitted only challenges to the selected response action. By not permitting *any* challenges to Government expenditures where the underlying selection of the response action is found to be not inconsistent with the NCP, the ruling below directly conflicts with the *NEPACCO* court's interpretation of section 107(a)(4)(A) of CERCLA.[2]

The Government also attempts to distinguish the decisions in *Lone Pine Steering Committee v. U.S. EPA*, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986), and *J.V. Peters & Co. v. Administrator, EPA*, 767 F.2d 263 (6th Cir. 1985), by reasoning that these decisions "address only whether responsible parties may obtain judicial review of an EPA response action prior to its enforcement." Br. Opp. 13. In both *Lone Pine* and *J.V. Peters*, the Government argued that CERCLA did not allow pre-enforcement review of EPA's actions and

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[2] The Government's Opposition similarly fails to cite or discuss this Court's statement in *Exxon v. Hunt*, 475 U.S. 355, 374-75 (1986), that each "expenditure" must be measured against the requirements of the NCP. *See* Pet. 11. Neither *NEPACCO* nor *Exxon* reads CERCLA to preclude challenges to the costs incurred in connection with a response action.

expenditures. To justify their conclusion that a ban on pre-enforcement review did not violate the constitutional guarantee of due process, the *Lone Pine* and *J.V. Peters* courts interpreted section 107(a)(4)(A) to provide liable parties with a subsequent opportunity to obtain meaningful review of the costs incurred by EPA. As the Third Circuit in *Lone Pine* explained, "Section [107] provides an adequate opportunity for the alleged responsible parties *to object to the cost* and adequacy of response actions." 777 F.2d at 887 (emphasis added). Similarly, the Sixth Circuit in *J.V. Peters* explained that courts in cost recovery actions must apply "the requirement that *costs* be 'not inconsistent with the national contingency plan'." 767 F.2d at 266 (emphasis added). Far from being merely "dicta," as the Government describes these passages, Br. Opp. 13, the holdings of both *Lone Pine* and *J.V. Peters* establish that parties separately may challenge *both* costs *and* response actions. Their interpretation of CERCLA is inconsistent with the ruling below, which holds that private parties can *never* challenge the costs the Government incurs because "[c]osts, by themselves, cannot be inconsistent with the NCP." Pet. App. 13a.

The Government's Opposition also fails to address the numerous district court cases cited in the petition that have recognized the right of private parties to challenge individual Government costs as "unreasonable," *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1415, 1418 (W.D. Mich. 1988), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *United States v. Ward*, 618 F. Supp. 884, 900, 901 (E.D.N.C. 1985); "excessive," *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1272 (D. Mass. 1988); *Industrial Park Development Co. v. EPA*, 604 F. Supp. 1136, 1144 (E.D. Pa. 1985); "unnecessary," *Cabot Corp. v. U.S. EPA*, 677 F. Supp. 823, 829 (E.D. Pa. 1988); and not "cost-effective," *United States v. Reilly Tar & Chemical Corp.*, 606 F. Supp. 412, 421 n.5 (D. Minn. 1985). While the Government may

choose to overlook or obfuscate the conflict in authority, the growing line of district court cases at odds with the decision below demonstrates the need for this Court's guidance.

The Government finally attempts to downplay the unfair and economically disastrous consequences of the Tenth Circuit's rule. The Government never disputes that the rule will allow the Government to recover expenses for "goldplated bulldozers," and "lavish dinner parties." Br. Opp. 14. It says nothing to rebut petitioners' argument that the Tenth Circuit decision will create incentives for fraudulent billings and fiscal mismanagement of the sort that are pervasive and well-documented in the Superfund program. Rather, the Government's response is not to defend the Tenth Circuit rule but to lash out at the petitioners, accusing them of spending $1,000 on a dinner. The Government seems to imply that it would be all right for the Government, but not petitioners, to be reimbursed for a $1,000 dinner.

To set the record straight: there is no $1,000 dinner charge (nor any cost incurred by *petitioners)* at issue before this Court, and petitioners do not believe that CERCLA should allow anyone to be reimbursed for $1,000 dinners. Yet, under the Tenth Circuit's decision, courts unquestioningly must award *all* costs, however excessive, unreasonable, and even illegal, of a response action that is not inconsistent with the NCP. If the cost in question is a gold-plated bulldozer, a $1,000 dinner, a collection of telephone calls to phone sex lines, or a multi-million dollar overcharge,[3] the courts' role—according to the Tenth

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[3] Compelling descriptions of the sort of abusive, fraudulent, and excessive charges incurred by EPA at specific Superfund sites, and in the general administration of the Superfund program, are contained in the two *amicus* briefs filed in support of the petition. *See* Brief of General Electric Company at 11-19 (discussing charges for telephone calls to sexually oriented "900" numbers, Christmas parties, football tickets, unused scientific equipment, business cards, potted plants, and numerous examples of multi-million dollar cost

Circuit and the Government—is simply to pass the bill on for payment to parties made liable under the statute.

Any other result, the Government argues, would turn the courts into "inspectors general." Br. Opp. 15. To the contrary, given the legacy of fraud and abuse in the Superfund program, any other result would require the courts to ignore statutory language and to become unwitting accomplices in the well-documented fiscal mismanagement and illegalities that plague the Superfund program. The right to obtain some judicial review of fraudulent, illegal, and excessively wasteful expenditures cannot be dismissed, as the Government suggests, as impermissible judicial "second-guessing." Br. Opp. 15.

II. THERE IS AN IMPORTANT CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER COURTS MUST IGNORE SUBSEQUENT EVIDENCE THAT SHOWS AN INTERLOCUTORY RULING TO BE IN ERROR.

On the second issue presented for this Court's review —the scope of appellate review of interlocutory orders— the Government attempts to mask the existence of a conflict among the circuits by offering irrelevant distinctions of the conflicting cases and mischaracterizing the issue presented. In the opinion below, the Tenth Circuit plainly stated that the record evidence produced at trial and the district court's own findings *could not be considered* by an appellate court that reviews an interlocutory grant of partial summary judgment. Pet. App. 16a. Petitioners contend that this ruling is inconsistent with Rule 54(b) of the Federal Rules of Civil Procedure, which expressly provides that interlocutory rulings always remain subject to revision in light of evidence that later becomes part of the record on appeal. This ruling also conflicts with decisions from the Seventh, Ninth, and Eleventh Circuits.

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overruns); Brief of National Association of Manufacturers, Chemical Manufacturers Association, Electronic Industries Association, and The Chamber of Commerce at 5-12.

The Government's Opposition asserts that there is no conflict of authority because the opinion below arises from an interlocutory *grant* of summary judgment, while most of the cases the petition cites as conflicting authority involved interlocutory *denials* of partial summary judgment. The Government's distinction is irrelevant to the principle the conflicting cases apply, namely that

> a party may not *rely on the undeveloped state of the facts at the time he moves for summary judgment* to undermine a fully-developed set of trial facts which militate against his case.

Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375, 1378 (11th Cir. 1988) (emphasis added).[4] This point is made clear by the Eleventh Circuit's description of its rule in *Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563 (11th Cir. 1989):

> *Even if summary judgment might have been granted at the time the motion was made*, we examine the record to see if "by trial the evidence ha[s] been supplemented or changed in some manner favorable to the party who opposed summary judgment."

Id. at 1567 (emphasis added) (quoting *Holley*, 835 F.2d at 1378). Thus, the erroneous denial of summary judgment remains subject to correction on the full record, despite the fact that the moving party was entitled to a grant of summary judgment on the record at the time its motion was made. In the Government's view, however, the erroneous *grant* of summary judgment must be set in stone, even where the full trial record later reveals that the motion was granted in error.

The Government attempts to justify this purported distinction by noting that a denial of summary judgment is a conclusion that "material issues of fact are in dis-

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[4] The Government's statement that the Eleventh Circuit has "expressly limited" its rule to cases involving the denial of summary judgment is incorrect. Br. Opp. 17. There is no such express limitation in the *Holley* decision at the place cited in the Opposition. *See* 835 F.2d at 1378. *Roper v. Edwards*, 815 F.2d 1474 (11th Cir. 1987), which the Government also cites, similarly contains no discussion of the scope of appellate review of interlocutory grants or denials of partial summary judgment.

pute," while a grant of summary judgment "rests on a judicial finding that no material fact is in dispute." Br. Opp. 17. That description is not a legal distinction. If the Government's point is that the party opposing summary judgment must demonstrate a material factual dispute at the time the summary judgment motion is pending or forever lose the opportunity, then the Government's own apparent endorsement of the Eleventh Circuit line of cases makes no sense. The Eleventh Circuit rule requires the appellate court to review *all* the facts subsequently produced at trial, even if the trial never should have taken place because the summary judgment should have been granted.

To be consistent, appellate courts must *either* restrict their review of interlocutory partial summary judgment orders to the record on which they were made, *or* allow review based on all the facts that are later developed. If (as the Government suggests) the law really favors the beneficiaries of erroneous grants of summary judgment over the beneficiaries of erroneous denials of summary judgment, this is a distinction that has never been explained in any court case or treatise petitioners (or apparently the Government) can find.

The Government's final argument—that review is inappropriate because "the petitioners have made no showing that the district court's post-trial remedy ruling undermined the prior grant of summary judgment"—mischaracterizes the issue before the Court. Br. Opp. 18. The Tenth Circuit stated that petitioners could not even *attempt* to make such a showing under its black letter rule of appellate procedure. As a matter of fact and law, petitioners dispute the Government's contention that all of its study and investigation expenditures would have been recoverable "irrespective of what remedy was ultimately selected." Br. Opp. 18 n.7. Contrary to the Government's assertion, HSC made several, detailed challenges to the Government's costs on grounds that the costs were inconsistent with NCP standards. *See* Defendants' Response

to United States Motion for Partial Summary Judgment on Response Costs; *see also* Pet. 15 n.9 (citing Pet. App. 270a). From the day this lawsuit was filed, an excavation remedy for the Royal Hardage waste disposal site was the "heart and soul" of the Government's case.[5] Pet. App. 56a. The petitioners, however, do not ask this Court to review the merits of the cost challenges made in the trial court, or to decide how and why the rejection of the Government's excavation trial remedy necessarily should result in the rejection of early work performed by the Government to justify its predetermined excavation remedy. Rather, petitioners ask this Court to review clear rules of law over which the courts of appeals have differed. Because of the way the court below interpreted the Superfund statute and the scope of appellate review, the petitioners never had the opportunity to prove that the Government's early costs, like the rejected remedy, were illegal and in violation of the Superfund statute. It is the rule of appellate procedure that foreclosed this opportunity which requires the Court's attention.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[5] The Government's early studies were calculated to justify an excavation remedy; the Government's experts steadfastly refused to accept any remedy that did not involve excavation; and the Government's lawyers spent four years in court fighting for an excavation remedy. Virtually all of the early costs incurred by the Government, and awarded through pretrial summary judgments, were spent to develop a case for an excavation remedy of the sort that was declared to be unlawful by the district court, and rejected by that court with stinging, critical commentary. *See* Pet. App. 59a-63a, 70a-72a.

Respectfully submitted,

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